

DATTARAYA S/O KESHAV TAWALAY

v.

SHAIKH MAHBOOB SHAIKH ALI & ANR.

October 24, 1968

[J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.]

Code of Civil Procedure (Act 5 of 1908), O.20, r. 14—Suit for pre-emption decreed—Court directs deposit of purchase money by a certain time—Appellate Court stays execution of decree—Purchase money deposited after the time fixed—Effect.

The appellant had obtained a decree for possession of certain lands in a pre-emption suit which he had brought against the respondents. The respondents' appeal to the District Court was dismissed. The District Court directed the appellant to deposit purchase money by a certain date and directed the respondents on the deposit to deliver possession of the property. There was also a direction in the decree that in case the amount was not paid on the due date the suit shall stand dismissed with costs. The respondents preferred a second appeal to the High Court and pending disposal of the appeal the respondents prayed for stay of the execution decree. Before the date fixed for depositing the purchase money the High Court stayed the execution of the decree of the lower appellate court. The appellant deposited the purchase price 3 days after the date fixed stating that he could not deposit in time as he fell ill. Thereafter the High Court dismissed the second appeal, and the appellant, obtained possession of the properties. The respondents applied to the Executing Court for restitution of properties on the ground that the appellant had defaulted in depositing, the purchase money by the date fixed by the lower appellate court's decree. The appellant contended that the stay order made by the High Court in the second appeal prevented him from acting in accordance with the terms of the lower appellate court's decree, and in any case the High Court had dismissed the second appeal and the decree holder would get by necessary implication a fresh starting point for depositing the purchase amount from the date of the High Court's decree. The Executing Court rejected the claim of the respondents for restitution. This decision was affirmed, on appeal by the District Court. But the High Court in appeal, took the view that there was default on the part of the appellant in depositing the amount and therefore the appellant's suit stood dismissed automatically and the appellant was not therefore entitled to possession in enforcement of the pre-emption decree.

HELD : The appeal must be allowed.

A decree in terms of O.20 r. 14, Civil Procedure Code imposes obligations on both sides and they are so conditioned that performance by one is conditional on performance by the other. To put it differently, the obligations are reciprocal and are inter-linked, so that they cannot be separated. If the defendants by obtaining the stay order from the High Court relieve themselves of the obligation to deliver possession of the properties the plaintiff-decree holder must also be deemed thereby to be relieved of the necessity of depositing the money so long as the stay order continues. [517 D, E]

The effect of the order of the High Court dismissing the second appeal was to give by necessary implication a fresh starting point for

A depositing the amount from the date of the High Court's decree and the appellant could have deposited the amount immediately after the High Court's decree. But the appellant had deposited the amount before the date of the High Court's decree and there was no default on the part of the appellant in fulfilling the terms of the pre-emption decree. [517 F—G]

B *Satwaji, Balajiray Deshamukh v. Sakharlal Atmgramshet*, I.L.R. 39 Bom. 175 and *Sita v. Ramnath* I.L.R. 28 Patna 371, approved.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 329 of 1966.

Appeal by special leave from the judgment and order dated October 11, 14, 1963 of the Bombay High Court in Appeal No. 30 of 1962 from the Appellate Decree.

C *D. Narsaraju and R. V. Pillai*, for the appellant.

M. S. K. Sastri and M. S. Narasimhan, for respondent No. 1.
The Judgment of the Court was delivered by—

D **Ramaswami, J.** This appeal is brought, by special leave, on behalf of the plaintiff against the judgment of the Bombay High Court dated October 11/14, 1963 in Appeal No. 30 of 1962 from the appellate order of the District Court, Osmanabad whereby the High Court reversed the judgment of the lower courts and declared that the appellant was not entitled to execute the decree for pre-emption and that the respondents were entitled to be put in possession of the properties of which they were dispossessed in the enforcement of the pre-emption decree.

E The appellant had obtained a decree for possession of certain lands in a pre-emption suit he had brought against the respondents. The decree was made in March, 1945 and the appellant was directed to pay the consideration of Rs. 5,000 within six months from the date of the decree on which the appellant was to be put in possession of the suit lands. In case of default in

F depositing the sum within the time the plaintiff's suit was to be deemed to have been dismissed. The respondents preferred an appeal to the District Court against the decree but the District Court confirmed the decree on January 28, 1955. The amount of Rs. 5,000 was deposited in Court by the appellant on December 20, 1954 within the time granted in the trial court's decree

G but it was subsequently withdrawn by him under orders of the Court. While dismissing the appeal of the respondents and confirming the decree for pre-emption, the District Court directed the appellant to deposit the sum of Rs. 5,000 on or before April 30, 1955 and directed the respondents on such deposit to deliver possession of the properties. There was also a direction in the

H decree that in case the amount was not paid on the due date the suit shall stand dismissed with costs. The decree was passed in conformity with O.20, r.14 of the Civil Procedure Code. The respondents preferred a Second Appeal to the High Court and

pending disposal of the appeal the respondents prayed for stay of the execution decree. On March 23, 1955 the High Court passed the stay order in the following terms :

“Stay of execution of decree of the lower appellate court is granted on condition that the appellant furnishes security to the extent of the amount of costs.”

The order was received by the trial court on April 19, 1955. The appellant who was directed under the terms of the lower appellate court's decree to deposit the sum of Rs. 5,000 on or before April 30, 1955 made default in depositing the amount on that date. He, however, deposited the amount on May 2, 1955. Since the deposit was not made in time according to the lower appellate court's decree an application was filed along with the deposit stating that the amount could not be paid in time as the appellant fell ill. The Second Appeal preferred by the respondents to the High Court was dismissed on October 6, 1960 and the pre-emption decree in favour of the appellant was confirmed. Thereafter on February 3, 1961 the appellant filed a Darkhast for possession of the suit properties. Since the application was within a year of the decree of the High Court a warrant for possession was issued by the Executing Court without notice to the respondents and the appellant also obtained possession of a portion of the suit properties under the aforesaid warrant. On February 8, 1961 the respondents filed an application in the Executing Court for restitution of the properties taken possession of by the appellant on the ground that the appellant had defaulted in depositing the purchase money on or before April 30, 1955 as required by the lower appellate court's decree and the Executing Court was in error in issuing the warrant for possession of the suit properties. The application for restitution was contested by the appellant on the ground that the stay order made by the High Court in the Second Appeal prevented him from acting in accordance with the terms of the lower appellate court's decree and in any case the High Court had dismissed the Second Appeal and the decree-holder would get by necessary implication a fresh starting point for depositing the purchase amount from the date of the High Court's decree. The Executing Court rejected the claim of the respondents for restitution and allowed the execution case of the appellant to proceed. Against this order of the Executing Court the respondents went up in appeal to the District Court which dismissed the appeal and confirmed the order of the Executing Court. The respondents thereafter took the matter in Second Appeal to the Bombay High Court which differed from the view of the District Court and allowed the appeal. The High Court took the view that there was default on the part of the appellant in depositing the amount and therefore the appellant's

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A suit stood dismissed automatically and the appellant was not therefore entitled to possession in enforcement of the pre-emption decree.

B The first question arising in this appeal is whether the High Court was right in taking the view that the effect of the stay order dated March 23, 1955 was merely to stay the delivery of possession by the judgment-debtors and not a stay with regard to the deposit of purchase price by the decree-holder. In our opinion, the High Court was in error in taking this view. The decree framed under O.20, r.14, Civil Procedure Code requires reciprocal rights and obligations between the parties. The rule says that on payment into court of the purchase money the defendant shall deliver possession of the property to the plaintiff. The decree holder therefore deposits the purchase money with the expectation that in return the possession of the property would be delivered to him. It is therefore clear that a decree in terms of O.20, r.14; Civil Procedure Code imposes obligations on both sides and they are so conditioned that performance by one is conditional on performance by the other. To put it differently, the obligations are reciprocal and are inter-linked, so that they cannot be separated. If the defendants by obtaining the stay order from the High Court relieve themselves of the obligation to deliver possession of the properties the plaintiff-decree holder must also be deemed thereby to be relieved of the necessity of depositing the money so long as the stay order continues. We are accordingly of the opinion that the order of stay dated March 23, 1955 must be construed as an order staying the whole procedure of sale including delivery of possession as well as payment of price. The effect of the stay order therefore in the present case is to enlarge the time for payment till the decision of the appeal.

F We are further of the opinion that the effect of the order of the High Court dated October 6, 1960 dismissing the Second Appeal was to give by necessary implication a fresh starting point for depositing the amount from the date of the High Court's decree. The decree of the High Court was dated October 6, 1960 and the appellant could have deposited the amount immediately after this date. But the appellant has deposited the amount on May 2, 1955, long before the date of the High Court's decree and there is no default on the part of the appellant in fulfilling the terms of the pre-emption decree. In the present case, when the High Court dealt with the Second Appeal filed by the respondents, the time limited by the trial court for making the deposit had expired. It was open to the respondents to press this point in the Second Appeal and for the High Court to decide that, the time having expired, it was not open to the plaintiff to make the deposit and there was nothing before the

High Court for decision. It was equally open to the High Court to dismiss the appeal and expressly extend the time for making the deposit. When the High Court refrained from following the first course and confirmed the trial court's decree, what was its intention? Surely it wanted to give the plaintiff an effective decree in his favour. If so, we are justified in holding that the High Court intended to exercise its power of extending the time for making the deposit, and incorporated in its decree the relevant provisions of the trial court's decree. That is to say, this is a case in which we must hold that a fresh starting point is implied in the decree of the High Court in the Second Appeal. The view that we have expressed is borne out by the decision of the Bombay High Court in *Sarwaji Balajiray Deshamukh v. Sakharlal Atmaramshet*(¹). In that case, the plaintiff brought a suit to recover possession of property as purchaser from defendants 1 to 6 and to redeem the mortgage of defendant 7. The first court having dismissed the suit, the appellate court, on plaintiff's appeal, passed a decree directing the plaintiff to recover possession on payment to defendants 1 to 6 of a certain sum within six months from the date of its decree and then to redeem defendant 7, and on the plaintiff's failure to pay within six months from the date of the decree he should forfeit his right to recover possession. All parties being dissatisfied with the decree, the plaintiff preferred a second appeal to the High Court and the two sets of defendants filed separate sets of cross objections. The High Court confirmed the decree and the plaintiff's second appeal and the defendants' cross objections were dismissed. Within six months from the date of the High Court's decree the plaintiff deposited in court the amount payable by him and applied for execution. Defendant 7 contended that the plaintiff not having complied with the terms of the decree of the first appellate court, his right to recover possession in execution was forfeited. The lower courts upheld the defendant's contention and dismissed the *darkhast*. On second appeal by the plaintiff, the High Court reversed the decree of the lower court and held that the time for executing a decree *nisi* for possession ran from the date of the High Court's decree confirming the decree of the lower court, for what was to be looked at and interpreted was the decree of the final appellate court. There is also a decision to the similar effect in *Sita v. Ramnath*(²). For the reasons already given we hold that the decree of the High Court in Second Appeal should be construed in the present case as affording by implication a fresh starting point to the plaintiff for making payment to the Court.

For the reasons expressed we hold that this appeal should be allowed, the judgment of the Bombay High Court dated October

1) I.L.R. 39 Bom. 175.

(2) I.L.R. 28 Patna 371.

A 11/14, 1963 should be set aside and the application of the first defendant made on February 8, 1961 for restitution under s. 144 of the Civil Procedure Code should be dismissed. In the circumstances of this case we do not propose to make any order as to costs of this appeal.

B Y.P.

Appeal allowed.